

**IN THE SUPREME COURT OF MISSOURI**

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**Appeal No. SC93511**

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**RONALD BREHM,  
Plaintiff/Appellant,**

**v.**

**BACON TOWNSHIP, CITY OF SCHELL CITY, MISSOURI, VERNON  
COUNTY, MISSOURI, and MISSOURI DEPARTMENT OF CONSERVATION,  
Defendants/Respondents.**

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**APPEAL FROM THE CIRCUIT COURT OF VERNON COUNTY, MISSOURI  
Circuit Court Case No. 08VE-CV00578**

**Honorable James R. Bickel, presiding**

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**BRIEF OF DEFENDANTS' BACON TOWNSHIP and  
SCHELL CITY, MISSOURI**

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**J. D. Baker, MBE 24881  
Baker Law Firm, LLC  
P. O. Box 565  
Osceola, MO 64776  
Phone (417) 646-8125  
Fax (417) 646-2617  
Email: [jd@bakerlawfirmllc.com](mailto:jd@bakerlawfirmllc.com)  
Attorney for Respondents Bacon  
Township and Schell City, Missouri**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of Circuit Court of Vernon County, Missouri, wherein the Court found that a certain road, designated as Cart Road 2710 (or alternatively, as CRD 2825/726) was deemed to be a public road. In doing so, the Court ruled that there had been a receipt by Vernon County, Missouri, of CART (County Aid Road Trust) funds for five years after January 1, 1990. Pursuant to the provisions of **§228.190.2 RSMo.**, the trial court determined that the receipt of these funds conclusively established the road at issue as a public road. Appellant contends that the statute just cited is unconstitutional as applied to this case.

**Article V, Section 3** of the Missouri Constitution vests the Supreme Court with “exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the constitution of this state.” However, the appellate jurisdiction of the Supreme Court is limited and the mere assertion that a statute is unconstitutional does not deprive the court of appeals of jurisdiction. The constitutional issue must be real and substantial; not merely colorable. *Schumann v. Missouri Highway And Transportation Commission*, 912 S.W.2d 548 (Mo.App.W. D. 1995) Because of the contention of Respondents Bacon Township and Schell City that the Appellant did not have a “vested interest” subject to Constitutional protection, all as set forth in Respondents’ Argument, Point I, these Respondents submit that jurisdiction does not lie with the Supreme Court.

## **STATEMENT OF FACTS**

### **PROCEDURAL HISTORY**

The original Petition was filed by Ronald Brehm, Appellant, (hereafter referred to in the Statement of Facts and in this Brief as the “Brehm”) on July 14, 2008. The original petition was filed only against Respondents, Bacon Township and City of Schell City, (who shall be referred to as “Bacon Township” and “Schell City”). The original Petition sought a declaratory judgment that a certain road, designated as Road 2710, was a private road owned by the Brehm or, alternatively, a public road now abandoned by nonuse without expenditure of public funds. The Petition sought to enjoin Bacon Township and Schell City from opening or maintaining the road as a public road. ***LF 10*** Bacon Township and Schell City both filed Answers denying the road was private or was an abandoned public road and alleged an affirmative defense that, because the road had been designated as a CART road, the road was conclusively deemed to be a public road pursuant to the provisions of ***§228.190.2 RSMo. LF 16 & 19***

On August 24, 2010, the Missouri Department of Conservation (“MDC”) was allowed to intervene as a party defendant. On November 16, 2010, upon motion to join a necessary party, Vernon County was added as a party defendant.

Thereafter, on March 21, 2013, all Defendants filed their Joint Motion for Summary Judgment, Statement of Uncontroverted Facts, and Suggestion in Support of Motion. ***LF 26 - 50*** Defendants relied on affidavits to establish that the road in question had been designated as a road for receipt of CART funds since at least 1992 and

contended that the road was conclusively deemed to be a public road pursuant to the provisions of **§228.190.2 RSMo**. On April 19, 2013, Brehm filed his Response to the Motion for Summary Judgment, Suggestions Opposing, and Statement of Additional Uncontroverted Facts. **LF 51-61** In his Response, for the first time, Brehm raised the issue of the unconstitutionality of **§228.190.2** .

After Reply by MDC and a hearing for the presentation of arguments of counsel, the trial court took the matter under advisement. On May 16, 2013, the trial court entered its judgment granting Defendants' Motion for Summary Judgment finding that the road in question had been designated as a CART road for more than five years after 1990 and that under **§228.190.2** was conclusively deemed to be a public road. **LF 75** This appeal followed.

### **SUMMARY OF EVIDENCE PRESENTED**

As the Motion for Summary Judgment was entered based upon the Statement of Uncontroverted Facts and the Affidavits of the Brehm, Pamela Richter and Mike Burton, and other supporting documents, Bacon Township and Schell City will adopt the Statement of Facts of Plaintiff as a statement of the evidence upon which the Court decided the Motion for Summary Judgment. Bacon Township and Schell City would however submit that since the only issue of the Motion for Summary Judgment was the applicability of **§228.190.2 RSMo**. and the designation of the road as a CART road, they do not admit the truth of the assertions of fact in the Affidavit of Brehm although noting those assertions will be accepted as true for purposes of the Motion and this Appeal,

except to the extent such assertions or allegations are contradicted or disputed by the Affidavit of Mike Burton.

Plaintiff's Statement of Facts was as follows:

"Plaintiff/Appellant, Ronald Brehm ("BREHM") purchased property adjoining the road that is the subject of this dispute in 1977, at which time the disputed road was used as a private driveway by his predecessor in title. Aff. of Ronald Brehm, Par. 1, LF 53. After BREHM purchase the property he continued to use the road as a private driveway. Aff. of Ronald Brehm, Par. 2, LF 53.

In approximately 1990, a gate was erected at the intersection of the road with 5<sup>th</sup> Street, in the City of Schell City. Aff. of Ronald Brehm, Par. 3, LF 53. The gate was locked and keys were kept by BREHM, Missouri Public Service and Union Pacific Railroad personnel. Aff. of Ronald Brehm, Par. 4, LF 53. In 2008, the gate was removed by Defendant/Respondent the City of Schell City. Aff. of Ronald Brehm, Par. 5, LF 53.

From 1990 until 2008, the road was used by persons other than BREHM only with BREHM'S permission. Aff. of Ronald Brehm, Par. 6, LF 53. Prior to 2008, BREHM from time to time permitted employees of Defendant Missouri Department of Conservation ("MDC") to access the road and provided a key to the lock for such permissive purposes. Aff. of Ronald Brehm, Par. 7, LF 53.

From 1977 until 2008, the road was maintained exclusively by BREHM. Aff. of Ronald Brehm, Par. 8, LF 54. No public funds were expended for the maintenance of the road until after the gate was removed in 2008. Aff. of Ronald Brehm, Par. 9, LF 54.

Any use of the road by MDC, including use by its agent, Mike Burton, was with the permission of BREHM. Aff. of Ronald Brehm, Par. 10, LF 54. Any members of the public who traveled the road between 1990 and 2008 did so without permission, and were trespassers. Aff. of Ronald Brehm, Par. 11, LF 54. Any employees or representatives of MDC who used the road between 1990 and 2008 did so either with permission, or were trespassers. Aff. of Ronald Brehm, Par. 12, LF 54.

The road in dispute in this case is known as Vernon County Road 2710, and is identified in the records of the Missouri Department of Transportation (“MODOT”) as CRD 2825/726. Aff. of Pamela F. Richter, Par. 7, LF 45.

Within the central office of MODOT, MODOT maintains maps, plats, inventories, and surveys of county roads, commonly referred to as CART roads, for which counties in Missouri receive county aid road trust (“CART”) funds. Aff. of Pamela F. Richter, Par. 2, LF 44. According to MODOT records, the road in dispute in this case, known as Vernon County Road 2710, and as MODOT road CRD2825/726, has been on Vernon County’s CART road inventory since at least 1992. Aff. of Pamela F. Richter, Par. 6, LF 44. Vernon County has been receiving allocation of CART funds for the road since at least 1992. Aff. of Pamela F. Richter, Par. 6, LF 44-45.

On a number of occasions since 1998, MDC agent Mike Burton traveled the disputed road. Aff. of Mike Burton, Par. 9, LF 49. Other conservation agents and MDC employees have traveled on the road from time to time since 1978. Aff. of Mike Burton,



Par. 10, LF 49. Members of the public have traveled on the road from time to time since 1978. Aff. of Mike Burton, Par. 11, LF 49.

Plaintiff/Appellant BREHM filed a PETITION FOR DECLARATORY JUDGMENT AND INJUNCTION, LF 10, seeking a declaration that the road is private, not public, and enjoining Defendants from removing any gate or access control device erected by BREHM. Defendants/Respondents Bacon Township, City of Schell City, Vernon County, Missouri, and Missouri Department of Conservation filed DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT. LF 26. After a hearing, the trial court granted the motion and entered judgment against BREHM. LF 75. BREHM appeals.”

**POINTS AND AUTHORITIES RELIED ON**

*Point I*

*The trial court did not erred in granting summary judgment in favor of Defendants/Respondents and against Plaintiff/Appellant by finding that the road at issue had been designated a CART road for in excess of five years and was therefore conclusively deemed to be a public road pursuant to the provisions of §228.190.2 RSMo., because the ruling was supported by the uncontroverted facts and did not unconstitutionally deprive Plaintiff/Appellant of any “vested” right or interest.*

*Burris v Mercer County, 252 S.W.3d 199 (Mo. App. W. D. 2008)*

*ITT Commercial Finance Corp., v. Mid–America Marine Supply Corp.,*

*854 S.W.2d 371 (Mo. En Banc, 1993)*

*§228.190.2 RSMo.*

***Point II***

***The trial court did not err in denying Plaintiff/Appellant's constitutional challenge to the validity of §228.190.2 RSMo. because the trial court's declaration that the road was conclusively deemed a public road by operation of law did not amount to a "taking" that was subject to constitutional prohibition.***

***Boone County v. Redden, 262 S.W.3d 291 (Mo. App. W.D. 2008)***

***Point III***

***The trial court did not err in denying Plaintiff/Appellant's constitutional challenge to the validity of §228.190.2 RSMo. because Brehm failed to raise the question of constitutional invalidity at the first opportunity.***

***Lewis v Department of Social Services, 61 S.W.3d 248 (Mo. App. W.D. 2001)***

## **ARGUMENT**

### ***Point I***

***The trial court did not erred in granting summary judgment in favor of Defendants/Respondents and against Plaintiff/Appellant by finding that the road at issue had been designated a CART road for in excess of five years and was therefore conclusively deemed to be a public road pursuant to the provisions of §228.190.2 RSMo., because the ruling was supported by the uncontroverted facts and did not unconstitutionally deprive Plaintiff/Appellant of any “vested” right or interest.***

\* \* \* \*

### **Standard of Review**

The propriety for the entry of a summary judgment is purely an issue of law. On appeal, the review is *de novo*. The appellate court standard for testing the propriety of the summary judgment entered by the trial court is the same as employed by the trial court to initially sustain the motion. ***ITT Commercial Finance Corp., v. Mid–America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. En Banc, 1993)** If the motion, the response, the reply, and the supporting affidavits, documents and attachments show there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law, the summary judgment should be sustained. ***Rule 74.06 (c) (6) Missouri Rules of Civil Procedure.***

Appellant has also raised an issue contending that the application of ***§228.190.2 RSMo.*** in this case is unconstitutional. The constitutional validity of a statute is a

question of law to be reviewed *de novo*. A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008)

\* \* \* \*

### Argument

Brehm contends that §228.190.2 RSMo., as enacted in 2006, is unconstitutional in that, by its provisions, it *ex post facto* deprives him of a vested right without due process of law and without just compensation. Bacon Township and Schell City disagree.

First of all, these Respondents do not interpret Brehm’s challenge of unconstitutionality of §228.190.2 to be per se unconstitutional in every instance. Instead, these Respondents interpret his challenge to be that it is unconstitutional as it relates to him because it deprives him of a “vested” right. Therefore, prior to any consideration of Brehm’s contention of unconstitutionality, the Court must first determine if a “vested” interest of Brehm has been deprived, taken or adversely effected by the trial court’s judgment. Absent a determination that Brehm had a “vested” interest to be protected, the question of constitutionality of the §228.190.2 should not be reached. To determine whether Brehm had a protectable vested interest, in addition to the Motion for Summary Judgment and supporting documents, the pleadings should be reviewed.

Brehm first filed his Petition on July 14, 2008. The Petition sought a declaratory judgment and injunction. Brehm claimed ownership of lands lying west of a railroad right-of-way, which he also claimed was abandoned. Regarding the road in question,

Road 2710, he alternatively claimed ownership of a prescriptive easement or ownership of the fee title to the road under the provisions of **§228.190.1** providing for abandonment of a public road by nonuse. Brehm did not claim an “exclusive” easement across the lands and, therefore, if it is determined that Brehm had a prescriptive easement only, Brehm’s “vested” interest was his right to use the road as a way of ingress and egress. Bacon Township and Schell City assert that the trial court’s summary judgment did not deprive Brehm of his right to use the road, as Brehm, a member of the public, would be entitled to use the open public road. Therefore, any “vested” right of Brehm to use the road is unaffected.

Alternatively, Brehm claimed ownership of the fee title to the road by virtue of the abandonment provisions of **§228.190**. It is ironic to note that Brehm’s claim of ownership of the fee title to the land on which the road is located must be based upon the provisions, **§228.190**, parts of which he now claims are unconstitutional. Without the provisions of **§228.190** concerning abandonment by non-use, Brehm has no claim of right to a “vested” interest.

Regarding such a “vested” interest, Brehm assumes that because he attached an Affidavit to his Response to the Defendants’ Motion for Summary Judgment, he has proven that he has a “vested” right which has been effected by the trial court’s ruling. In essence, he is contending that just because he has attached an Affidavit to his opposition to the Motion for Summary Judgment, the road is “deemed” to be abandoned such as to give him a “vested” interest. In effect, he is asking that, because he has attached an

Affidavit to his Response which he contends shows abandonment, his Affidavit be treated like a judgment or summary judgment that the road was abandoned and he thus has a vested interest. These Respondents do not believe that the merely filing of an Affidavit rises to that level.

In Brehm's Affidavit, *LF 53-54 & App5*, he asserts that he used the road as a private driveway, erected a gate across it in 1990 which was removed by Schell City in 2008, the road was used by MDC and its employees with permission only, was maintained exclusively by him with no public funds expended for maintenance until after the gate was removed, and that any members of the public that used the road did so without permission and were trespassers.

To the contrary, these facts were disputed by the Affidavit of Mike Burton attached to the Defendants' Motion for Summary Judgment. *LF 48-49 & App7* In that Affidavit, he states that he was employed by the MDC since 1977 and since 1978 had patrolled the Schell Osage Wildlife Area, the land adjoining the road on the other side of Brehm. He stated that he and other MDC employees had traveled and used the road for patrolling and management of the wildlife area. He also had observed members of the public using the road. In his affidavit he does not mention that his use of the road, the use of the road by other MDC employees, or the use of the road by the public was with the consent of Brehm.

In comparing the two Affidavits, it is apparent that they present a genuine issue of a material facts regarding abandonment such that summary judgment could not be



granted on the issue of “abandonment”. A “genuine issue” exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. A “genuine issue” is a dispute that is real, not merely argumentative, imaginary or frivolous. *ITT Commercial Finance Corp., v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. *En Banc*, 1993) That same genuine issue prevents an assumption on this appeal that Brehm has a “vested” interest that is being deprived or effected.

Even if not otherwise disputed, the facts recited in the Brehm Affidavit are insufficient to support a finding of abandonment. In *Burris v Mercer County*, 252 S.W.3d 199 (Mo. App. W. D. 2008), the court stated that vacation of highways is not favored and the presumption will always be in favor of their continuance. Vacation cannot be done to the injury of abutting owners unless upon a proceeding for vacation. The court further stated that the right to use a public road cannot be surrendered or abandoned unless all of the public concurs therein. A public road used “infrequently, intermittently, or rarely” by the public does not meet the standard for abandonment. Even if one member of the public uses the road at all, this shows a lack of concurrence by all of the public and will prevent the road from being deemed abandoned. The Affidavit of Mike Burton shows use by, or at least a genuine issue of use by, at least one member of public. The stipulation between Brehm and MDC in a separate lawsuit, *LF 40-43*, and the Exhibits attached to the various Affidavits relating to the Motion for Summary Judgment conclusively show that the lands of MDC abut the road proposed to be vacated.

MDC has intervened in this action specifically to protect its rights in the road. MDC definitely has not consented or concurred in the abandonment of the road. Therefore, under *Mercer*, the road cannot be deemed to be abandoned. If not abandoned, then Brehm does not have “vested” right that has been taken or affected.

Finally, Brehm does not dispute the fact that the road at issue had been designated as a CART road for which Vernon County had received CART funds since at least 1992. Since he does not dispute this fact, the central requirement of §228.190.2, has been met. For a period of at least five years after January 1, 1990, the road had been identified as a county road for which the county receives allocations of county aid road trust funds. Since this element or requirement has been met, the road “shall be conclusively deemed to be a public county road without further proof of the status of the road as a public road”. Having been conclusively deemed to be a public road, summary judgment was proper and the trial court’s judgment should be sustained.

## ***Point II***

***The trial court did not err in denying Plaintiff/Appellant’s constitutional challenge to the validity of §228.190.2 RSMo. because the trial court’s declaration that the road was conclusively deemed a public road by operation of law did not amount to a “taking” that was subject to constitutional prohibition.***

\* \* \* \*

### **Standard of Review**

Appellant has raised an issue contending that the application of §228.190.2 RSMo. in this case is unconstitutional. The constitutional validity of a statute is a question of law to be reviewed *de novo*. A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. ***City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008)**

\* \* \* \*

### **Argument**

One aspect of Brehm’s constitutional challenge to the validity of §228.190.2 RSMo., is his contention that the trial court’s judgment amounted to a “taking” of a vested interest. Again, these Respondents disagree.

In ***Boone County v. Redden*, 262 S.W.3d 291 (Mo. App. W.D. 2008)**, the appellant contended that the trial court lacked jurisdiction to declare a road as a public road established under the provisions of §228.190 RSMo. after a finding of ten years of public use. Appellant contended that the declaration could not be made without first

determining the amount of the just compensation to which she was entitled as a result of the purported taking. She contended the declaration without just compensation for the taking violated the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution and the eminent domain provisions of ***Article I, Section 26 of the Missouri Constitution***.

Although decided on other grounds, the court stated that a declaratory judgment establishing a public road pursuant to the provisions of **§228.190** through public use and expenditure of public money for ten years was not a “taking”. The court stated that “the road had been rendered public by operation of **§ 228.190**. The public easement over the property was established by use and arose by operation of law.” ***Id at p. 292.***

Bacon Township and Schell City submit that the trial court’s declaratory judgment in this case was not a “taking”. In this case, the public easement was created by the expenditure of CART funds and public use, and arose by operation of law. Since arising by operation of law, it is not a taking subject to the constitutional prohibition against a taking without just compensation.

### ***Point III***

***The trial court did not err in denying Plaintiff/Appellant's constitutional challenge to the validity of §228.190.2 RSMo. because Brehm failed to raise the question of constitutional invalidity at the first opportunity.***

\* \* \* \*

### **Standard of Review**

Appellant has raised an issue contending that the application of §228.190.2 RSMo. in this case is unconstitutional. The constitutional validity of a statute is a question of law to be reviewed *de novo*. A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. ***City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008)**

\* \* \* \*

### **Argument**

In ***Lewis v Department of Social Services*, 61 S.W.3d 248 (Mo. App. W.D. 2001)**, the Court stated

To properly raise a constitutional issue, a party must: (1) raise it at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

***Id. at p. 254.***

In the instant case, Bacon Township and Schell City first pled **§228.190.2 RSMo.** as an affirmative defense in their original answers filed August 21, 2008. Brehm did not raise the issue of the constitutional invalidity of that section until the filing of his Response to the Motion for Summary Judgment on April 19, 2013, after more than four years of pleadings, motions, discovery, hearings and other legal proceedings. Respondents submit that the constitutional issue was not raised at the first opportunity and was not timely presented to the trial court. Therefore, the trial court's denial of the constitutional challenge was warranted as it was not properly raised at the first opportunity.

## CONCLUSION

In conclusion, Bacon Township and Schell City submit that the trial court did not err in granting summary judgment on all Defendants' Joint Motion for Summary Judgment. It was conceded that the road at issue had been designated as a CART road for more than five years and was therefore conclusively deemed to be a public road pursuant to the provisions of **§228.190.2 RSMo**. Brehm's challenge to the constitutionality of **§228.190.2** should be denied as Brehm does not have a "vested" interest subject to constitutional protection. Similarly, the trial court's declaratory judgment did not constitute a "taking" without just compensation as the public road arose by operation of law. Finally, Brehm's constitutional challenge should be denied as it was not raised at the first available opportunity.

The trial court's judgment should be upheld.

Respectfully Submitted

/s/ J. D. Baker

J. D. Baker, MBE 24881

Baker Law Firm, L.L.C.

P. O. Box 565

Osceola, MO 64776

Ph (417) 646-8125

Fax (417) 646-2617

Email: [jd@bakerlawfirmllc.com](mailto:jd@bakerlawfirmllc.com)

Attorney for Defendants, Bacon  
Township and City of Schell City,  
Missouri

**CERTIFICATION REGARDING TYPE SIZE, FONT, AND**  
**NUMBER OF WORDS**

The undersigned certifies that his Brief was prepared using a Microsoft Office Word word processing format, proportional 13 point Times New Roman font type, contains 5176 words.

/s/ J. D. Baker  
J. D. Baker

**CERTIFICATE OF SERVICE**

The undersigned certifies on this 7<sup>th</sup> day of November, 2013, the Brief, with accompanying Appendix, of Respondents, Bacon Township and City of Schell City, Missouri, was submitted to the Clerk of the Supreme Court for filing using the Court's electronic filing system. The undersigned further understands that upon such electronic filing, service of the Brief is accomplished on all attorneys of record.

/s/ J. D. Baker  
J. D. Baker